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THE NAZI CONCEPTION OF LAW

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THE conception of law in Germany has been radically altered since Hitler came to power in 1933. In the last resort, as a German writer has stated, law in Nazi Germany is nothing more nor less than what the *Führer* decrees. In this Pamphlet Mr. J. W. Jones (Fellow of the Queen's College, Oxford) describes the principles and theories on which Nazi law is founded —the Leadership principle, the racial theory, the 'revolutionary' character of Nazism, the notion of *lebensraum* and so on—and their application to the different branches of law, including international law.

For the Nazi conception of 'Race' and the theory of *lebensraum* see No. 5 in this series, '*Race' in Europe*, by Julian Huxley, and No. 8, *Living-space*, by R. R. Kuczynski.

¶ *A list of the Oxford Pamphlets will be found on the back of the cover*

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THE NAZI CONCEPTION OF LAW

The Regimentation of the Lawyers

FOR a proper appreciation of the Nazi attitude to law it is necessary, first of all, to take into account the conditions in which those whose particular business it is to expound and work out legal ideas have been living since 1933. In Germany every lawyer has been compelled to join what is called the *Rechtsfront* as a member of the BNSDJ, the *Bund* or Union of German National-Socialist Jurists, which has superseded all the former professional associations. There is also the Academy of German Law, legally incorporated in July 1934 for the purpose of supervising the application, administration, and teaching of the law. It is not surprising, therefore, to find that the law teachers have contributed their full share to the long list (well over 1,000 in number) of university professors and lecturers who have been dismissed or compulsorily retired on grounds of race, or faith, or of general 'political unreliability'. Those teachers and writers who have not come under the ban have escaped only because their views could not by any stretch be interpreted as conflicting with the political doctrines which have been in favour with the régime.

The position of the judges is equally precarious. It was regarded as a great triumph for democratic principles when, in 1919, the young German

Republic adopted Articles 102 and 104 of the Constitution of Weimar. The first declared that 'Judges are independent and subject only to the law'; the second that 'The Judges of the ordinary Courts are appointed for life. They may be removed from office, permanently or temporarily transferred to another position, or retired, only on the authority of a judicial decision, and only upon grounds and by methods of procedure fixed by law.' Less than nothing now remains of these principles. In all cases involving questions of public policy the Judiciary has become simply a creature of the Executive, a mere branch of the Government.

Some Nazi writers have openly proclaimed that it is the function of all lawyers, whether judges or jurists, to adjust their standpoint to the surrounding political atmosphere. All law, they urge, must be openly and frankly political. To endeavour to approach the law without any political bias seems to them so far from being praiseworthy as to amount to a declaration of bankruptcy by the lawyers. Unfortunately for the German lawyers, their rulers have been much more concerned to meet the exigencies of the moment than to remain loyal to their published professions of faith. Since the seizure of Czechoslovakia voices have been heard asserting that all earlier doctrine has become out of date, and it will certainly call for considerable agility on the part of the German legal and political writers to bring their former pronouncements into line with recent developments. But it can be said that up to March 1939 the National-Socialist theory of law on

the whole followed a fairly consistent course. Like National-Socialist political theory it was based upon two principles: the leadership principle and the racial principle.

The Leadership Principle

In Nazi Germany, as in Fascist Italy, the essence of the new creed is believed to be contained in the words 'unity' and 'integration'. The very notion of the State is held to imply strength, and the State, it is believed, can only be strong where the executive power is untrammelled by the checks which in a democracy it is the purpose of legislative assemblies to provide. Parliaments are taken to mean parties, and internal party divisions are assumed to be a source of weakness by expending national energy without a compensating return in motive power. The efficiency of all political and legal machinery is judged by the smoothness and speed which it brings to the functioning of the Nation-State. Action, instant and overwhelming, must be the primary purpose of the State. But the State is a group. Therefore, State action is dependent on the existence of a Leader (*Führer*) and on unquestioning faith in the creed of leadership.

But if the position is accepted that a group cannot act promptly without a Leader, it is said to follow that leadership is thwarted unless the group is homogeneous. This homogeneity is secured by the process of *Gleichschaltung*, a term which has no exact counterpart in English but which has been defined by one German writer as 'the method

which secures, at first perhaps only outwardly (a significant reservation), a political homogeneity of public life'. Its justification is said to lie in 'the necessity for removing all conflicting social and political forces which may, in the slightest degree, impair the domination of the unified Executive'.

First of all, there must be unity of race, and this involves the driving from public position and public influence, i.e. from all share in government, the professions, education, and the press, of everybody who by reason of race can be branded as 'non-Aryan', according to the terminology now in vogue in Germany. As a logical consequence of this principle, German law, in theory at least, admits to the assembly of the Reichstag men of German blood, even if they are citizens of a foreign State. It also allows Germans by race to give their votes when plebiscites of the whole population are held, provided the voters are temporarily in Germany or on a German ship on the high sea. Jewish blood makes German citizenship impossible, although, at least as late as 1936, it seems to have been held that it did not deprive a man of his German nationality in the wide sense, i.e. of having many of the duties, if not the rights, of German citizens.

Secondly, such remnants of Federalism as existed under the Republic before 1933 have vanished. Individual 'States', if we may use the term, such as Bavaria, have lost whatever independence they formerly enjoyed. The Weimar Constitution expressly recognized that there were certain affairs which fell within the province of the States com-

posing the Republic, and outside that of the central government. Now the component units have no autonomy whatever. They are little more than administrative areas within a unitary system, under governors who are answerable to the Leader alone. And, as in other despotisms, the Nazis' determination to reduce to a common level of subjection all who are under their sway has shown itself in hostility to all groups which may come between the absolute State and the individual citizen. Even when the groups exist for religious, social, or educational purposes, having no connexion with politics, their rights are regarded as existing simply by the grace of the State, by a concession which may be withdrawn at will. In addition, trade and financial corporations have to face the charge of having usurped State functions and of having used the notion of corporate personality to provide a German cloak for the manipulations of foreign and 'non-Aryan' speculators.

The Leader

In the person of the Leader the two notions of authority and representation are believed to have come together in a perfect unity. But the German idea of representation is not that which the democratic franchise seeks to realize through election of members of different parties and by entrusting the government to the party or group of parties which secures a numerical majority at the polls. And in their description of the attributes and functions of their Leader even the legal theorists surrender

themselves to a sort of mystical ecstasy. He is pictured as representing no concrete person or persons, nor again the collection of individuals forming the nation at any one specified time. He embodies some sort of transcendent unity which soars above the desires or interests of a transient majority. In and through his words and acts the Nation for the first time comes to real life. His decrees are to be respected as expressing eternal truths rather than a compromise between divergent views. And here writers employ an abundance of different analogies. Sometimes the Leader is the Nation's clenched fist in which are knit all the national strength and resolution; sometimes he is the father who stands for the family, not by vote or consent but by the authority inherent in fatherhood; sometimes, again, he is the Pope whose words are unquestioned truth for those who share the national faith. This, it is claimed, is still a democracy—an authoritarian as opposed to an atomistic democracy. The people as a whole, by plebiscite or through the Reichstag, may be called to endorse specific measures, but the essence of authoritarian leadership is that initiative as well as decision rests with the Leader, to whom all are answerable and who rules because he serves.

The Nazi Party

It need hardly be said that this attitude of mind cannot tolerate anything resembling the party system of democratic States. As in Russia and Italy

there is one Party only, and for practical purposes this Party is identified with the State. Therefore, the membership of another party, supposing one were found to exist, becomes a crime corresponding to the crime of treason elsewhere and punishable with death. In the Nazi Party, it is asserted, the German conception of State and Society finds its exclusive expression. Nevertheless, full membership of the German Nazi Party, as of the Russian Communist Party, is confined to a relatively small minority of the people. The members constitute the vanguard of the people; they are themselves leaders, and this status not only gives them peculiar privileges, but also imposes upon them special responsibilities and obligations. In their relations to one another the party members are regarded as bound by ties of the closest trust and intimacy. 'Theft from a comrade', it is explained, 'is not on the same footing as theft from a stranger', and it should be much more severely punished. To illustrate the leadership principle, German writers sometimes go back to the old feudal days. The feudal leader had his train of followers, which is believed to have formed a real popular aristocracy, and not an exclusive class of the *élite*; they were united to their leader and to one another by feelings of the most intense personal loyalty, and yet, so it is imagined, they were one in heart and mind with the people whose mouthpiece was the leader. This is put forward as a totally different conception from the 'essentially anti-democratic ruling class principle' of parliamentary government.

Applications of the Principle

Attempts have been made to give this principle practical effect in more than one direction. The National Labour Act, 1934, for instance, began the crusade against the 'class-war' by applying the leadership principle to industry. Just as there are to be no parties in politics, so there can be no trade unions of employers or workmen. Each factory or workshop becomes a 'works community'. The workers are described as the *Gefolgschaft*, or band of followers, who must work with the employer or 'leader' to promote the interests of the establishment. They act through a number of their fellows who, together with the leader as their president, form a confidential council. In the same way, what are called 'social honour courts' have been set up, consisting of a judicial official as chairman, with one leader and one worker member of a confidential council as assessors. Through these courts the Party exercises a stringent control of the liberty to work and to employ workers, and the dragooning of individuals is disguised under the cloak of the leadership principle. The penalties, which may be inflicted for breach of the social duties incumbent upon every member of an establishment, range up to heavy fines and may entail dismissal from employment.

Legislation concerning companies has also used the leadership principle to increase the powers of the board of directors at the expense of the general meeting of shareholders. 'Irresponsible' share-

holders, it is thought, should not have the power of interfering in matters of finance and management, which require training and experience.

The Nazi Attitude to Statutes

From the time when thinkers first began to discuss the nature of law, there has been much controversy as to the precise relation of the State to law. Is the State subject to law, or is law the creature of the State so that the rulers can make or unmake law at will? Recently there has been much support for the view that State and law are so inextricably bound together that it is meaningless to speak of either being above or below the other. This notion of the indissoluble union of State and law has been expressed in Germany by the term *Rechtsstaat*. The precise meaning of the word has varied from time to time and from writer to writer, but it has in general been used to denote that the rulers of a State are in some way, possibly through the existence of some constitutional machinery, bound by law, at least to the extent that they cannot simply annul it at their pleasure.

Can there be a State which is not a *Rechtsstaat*, and is Germany now a *Rechtsstaat*? It is significant that the Nazi lawyers have taken over the word from their predecessors and have never expressly denied that a true State must be based upon a certain respect for law. They have, however, fallen back on the distinction between law in general (*Recht*), and that branch of law known as statute law, consisting of rules laid down in general terms

for the future by a competent legislature (*Gesetz*). Germany, they say, is a genuine *Rechtsstaat*, but not a *Gesetzesstaat*—not a State in which law has been submerged by statute. They are fond of pointing out that, even in the democracies, statute law is having to give ground to regulations made by administrative boards, government departments, and subordinate officials. They argue that on some matters detailed and rigid legislative provisions are being found less adapted to modern conditions than elastic standards leaving room for discretion in their application. Are there not even codes, such as the Swiss Code of 1907, which have expressly admitted that it is impossible to foresee all cases which may arise, and that to fill up gaps the judge may often have to play the part of a legislator?

From all this the Nazis deduce that respect for statute as such is just another of the superstitions of old-fashioned Liberalism. They agree with the Soviet lawyers that the reverence paid to statutes is little more than a *bourgeois* fiction. And they have still less use for the distinction drawn in countries like the U.S.A. between constitutional laws, which cannot be enacted or repealed by the ordinary legislature, and ordinary statutes, which can. After all, when the law *in toto* is reduced to a mere expression of the will of the Leader, all such distinctions become insignificant. Thus one reputable German writer describes the German *Führerstaat* as *der deutsche Rechtsstaat Adolf Hitlers*—the German *Rechtsstaat* of Adolf Hitler—because, in the

last resort, law in Nazi Germany is nothing more or less than what the *Führer* decrees.

Since, however, even in Germany there must continue to be laws which can only be described as statutes, the lawyers urge that they should be general in scope and simple in wording. They believe that statutes should usually contain a preamble or introductory part setting out the general purpose of the statute, and that the details should be left to be worked out by judges and officials in the spirit of this preamble. The dictators of to-day, like Frederick the Great and Napoleon in the past, cherish the notion that, if laws were drafted in language intelligible to the layman, it might be possible to dispense altogether with professional lawyers; but it may be that they are thinking less of the difficulties which technicalities place in the path of the layman than of the checks they impose on the despotic acts of rulers and executive officials.

And the Nazis are far from being prepared to entrust to judges the powers they refuse to legislatures. The practice of judicial review of the constitutionality of statutes, such as it is found in the U.S.A., where the Courts may refuse to apply enactments which they hold to be contrary to the written Constitution, never found favour in Germany even before 1933, when Germany possessed a written Constitution; and there is less place for it now than ever. Since the Leader is accepted as embodying the will of the State, no one other than the Leader can give the final word as to the validity

of any particular statute or regulation or judicial decision. It may or may not be true that in the U.S.A. the Constitution is, in the end, what the Supreme Court says it is. It is certain that in Nazi Germany the Leader, and not any Supreme Court, is the 'guardian of the Constitution', if a Constitution can be said to exist. The most that writers will concede is that the judge may occasionally depart from a pre-1933 statute, but even here he is warned to proceed with the utmost caution, and when in doubt to leave the question for decision by the political authorities.

The Permanent Revolution

Part II of the Weimar Constitution is devoted to a declaration of the 'Fundamental Rights and Duties of Germans'. Among these rights are the right to change one's domicile within the Reich, to emigrate, to speak one's own language if it should not be German, to assemble peaceably and unarmed without special permission, to form unions and associations, and to practise one's religion undisturbed. All Germans are declared to be equal before the law. Their personal liberty, their place of residence, the secrecy of their correspondence, all are guaranteed as inviolable. If any German ever reads the Weimar Constitution nowadays, he must do so with mixed feelings. These rights were believed to be the results achieved by the revolution of November 1918. There has never been any place for them under the Nazi régime. It might be thought that, as the years elapsed after the Nazi revolution of

1933, the excitement which characterizes every such upheaval would have given way to settled conditions based on measures directed to the establishment of ordered security by respect for human personality. But it is the common feature of the despotisms of Russia, Italy, and Germany that they deliberately encourage the continuance of a revolutionary outlook, provided, of course, that it is not directed against themselves. Political expediency, and not legal stability, is the determining factor in all questions of law or rights.

Long after the uprooting of the old system, the rulers of Russia and Italy have persisted in asserting that their countries are still in a state of war. Although as early as 12 July 1933 the German *Führer* declared that the Nazi revolution was 'closed', he and his followers have continued to warn the people that the seizure of power was by no means the end of the struggle, and Germany has been constantly described by the Nazis as an armed camp. It is significant that the theory of politics most favoured in Nazi Germany seems to be that which regards political grouping as grouping according to the distinction between friend and foe. Internal politics should be aimed at exterminating the enemy within the gates. When this has been done, political leadership must be directed towards keeping the people constantly warned of the real or supposed enemies waiting to spring from without. When they are asked why in England government is possible without the oppressive measures which are claimed to be necessary in Germany, the

Nazis reply, somewhat contemptuously, that when a people lives on an island it can dispense with a State (as conceived by the Nazis). Since law is simply a 'political act', legal rules must be left to take their chance in the moving quicksands of political opportunism.

And yet the Nazis are quick to insist that their accession to power in 1933 was perfectly legal, as being within the framework of the Weimar Constitution, which indeed has never been formally abrogated. It is not the fact that it makes a breach in legal continuity, they say, which entitles a movement to be called a revolution, but the introduction by it of a new and positive outlook upon life and the world—a new *Weltanschauung*. The 'glorious' revolution of seventeenth-century England, and the French revolution a century later, seem to the Nazi writers hardly to deserve the name. The notions of the sanctity of individual personality, of liberty and equality, are brushed aside as wholly negative. The English are able to afford to cherish the ideal of liberty because they have the blessings of comparative isolation and internal homogeneity. The French ideal of equality is dismissed as barren Liberalism. The Nazis look in vain for any new idea in the Weimar Constitution; the disappearance of the Kaiser and his ministers was due to a revolt, not a revolution. The Revolution, they say, did not come till 1933, with the advent to power of men professing the new principles of leadership and race as the foundations of the State; and this Revolution has not yet reached its end.

The Racial Theory of Law

The German craving for political unity can only be properly understood when we remember that at the beginning of the nineteenth century Germany was divided into at least forty sovereign states. In the same way, the German racial theory of law has its psychological basis in the strange phenomenon of the reception into Germany in the fifteenth and sixteenth centuries of a foreign system based on Roman Law.

One result of the German struggle against Napoleon was that certain German jurists, who came to be known as the Historical School, began to put forward the notion that law is essentially a national product, an emanation from what they called the *Volksgeist*—the soul or spirit of the people—a psychological abstraction which they, perhaps wisely, made little attempt to elucidate further. The Nazi lawyers have found this term admirably adapted to their somewhat nebulous ways of thought, adding the gloss that the *Volksgeist* cannot be a living reality unless the *Volk* itself is racially pure. The Nazi State, therefore, should not open its doors to all who may wish to enter; it must exclude those who are suspect on account of racial origin or sympathies. Unlike the Liberal State, it must be based on a nation firmly knit together by the tie of blood as well as of soil.

In 1900 Germany embodied in the great Civil Code, containing over 2,000 sections, the great mass of the law of property and of civil, as opposed

to criminal, liability. When the exponents of the racial theory look into this Code they find a state of affairs which they cannot possibly square with their creed. Here is nothing resembling a native body of rules, such as we have in England, continuously and almost imperceptibly developing through the centuries without any substantial foreign importation. Instead, what they see is a system founded in ancient Rome, worked out in detail by the Jurists under the Roman Emperors in the second and third centuries of the Christian era, digested and to some extent codified in the *Corpus Juris* of Justinian in sixth-century Byzantium, and which, after being modified to suit the conditions of medieval Europe by Italian commentators, was finally received into Germany in the sixteenth century through the agency of officials who had been trained south of the Alps and were indifferent to the customs and institutions of their native land.

Curiously enough, the founders of the Historical School, despite their belief in the *Volksgeist* as the source of law, seem to have had little curiosity as to the state of German law before the reception of the Roman system. They reconciled their creed with the fact of this wholesale importation of a foreign system into Germany, by dogmatically asserting that in matters of law the professional lawyers represent the people. In the second half of the nineteenth century, however, there appeared a group of writers who declared that the old Germanic law had not been altogether obliterated, though it may have been driven into obscure nooks

and corners. These Germanists devoted their energies to the task of revealing and, where possible, reviving and reintroducing, the native institutions and concepts. Although their work was not quite without influence upon the deliberations of those lawyers and others who finally completed the German Civil Code, many of them continued to look askance at this document as being far too Roman and un-German. As early as 1920 the programme of the National-Socialist Party included (in point 19) the demand for the substitution of German law for the 'materialistic and cosmopolitan' Roman law. And, since 1933, the watchword of those who have been urging the need for a pure law has been 'German law in place of Roman law'.

In a pamphlet which, though it was written before 1933, has been prescribed as a text-book in the law schools of Germany, so its author proudly tells us, there is an exposition of the racial philosophy in its application to law. 'It is due to the German people', says the writer, 'that it should have a German law: and a pure law can only proceed from a pure race.' In order to support the demand for as clean a sweep as possible of the rules in the present German Code, some of the Nazi lawyers make the period of the reception of the Roman law extend from the first half of the fourteenth century right down to 1933. They also attack the Roman law at its fountain-head by accepting the argument advanced by some Romanists, often more on a foundation of conjecture than of positive proof, that much of the *Corpus Juris* of Justinian, from

which the modern law proceeds, was the product, not of the Romans at all, but of the law schools of the Eastern Empire, particularly that of Beyrout in Syria. Thus most of the so-called Roman law, they say, was not even Roman; it was Byzantine and to some extent Oriental. And not content with this, they go on to hint that the late Roman law had become degenerate under Jewish influences. Thus it is not uncommon to find the Nazi lawyers tacking on, in the German fashion, to the term 'Roman' a long string of other adjectives. The Code of 1900, they complain, is called a German Code, but in addition to being Roman, it is abstract-materialistic-cosmopolitan-Oriental and, of course, Jewish.

At the time of its introduction, some of the critics of the German Code declared that it was less genuinely German than even the French Code of Napoleon; and more recently the Swiss Code has been extolled as providing a model in some respects of what a Germanic Code might be. Indeed, we sometimes find Nazi writers casting envious glances at our own law for its comparative freedom from Roman influences and for the close contact it has maintained with practical life. On the other hand, the doctrine of precedent, according to which every English Court is bound by the decisions of Courts superior to itself, and the highest Court, the House of Lords, is bound by its own decisions, is a favourite subject of sneers among the Germans as a superstitious cult cramping our national development. One writer traces what he calls our 'realistic' approach to legal problems to the fact that England,

as he sees it, is essentially a *Führerstaat*, and that the English 'gentleman' is a true *Führer* type. The absence of a written Constitution in England and the dislike of English lawyers for the academic treatment of constitutional questions, he holds, bring England into line to some extent with Nazi doctrine.

During the past six years the lawyers of Germany have been persistently urged to root out an alien legal system and to put a People's law in place of a Jurists' law. But, none the less, even the Nazis have to admit that many parts of the existing Code are so firmly based in reason and common sense that to remove them would produce complete chaos. These the Nazis hope to extricate from the 'wholly Roman' parts, for just as the theologians have apparently found it possible to save some of the Psalms by attributing them to 'Nordic Persians', so the lawyers have found signs of Germanic influence even in the law of ancient Rome.

The Socialist Aspect of Nazi Legal Theory

Ownership. So far at least, the purely racial approach to law has not produced many constructive achievements; it has been mainly directed towards weakening the hold of the Code upon German theory and practice. But since the beginning of the régime some of the Nazis have tried to give some significance to the 'Socialist' as well as to the 'National' half of the title adopted by the Party. Here, again, the Roman system, owing to its strongly marked individualism, has offered an easy target to

those who think that the State is everything and the individual human being nothing. And they have been able to cite in aid the many criticisms which have been levelled against such definitions of the notion of ownership as were current in France and Germany during the hey-day of *laissez-faire* economics, and which have been followed by the German Civil Code in the section (903) which speaks of an owner as being 'free to dispose of his property at his free discretion'.

Of course, the lawyers who framed these definitions knew very well that no system of law has ever been able to dispense with restrictions placed on individual ownership in the interests of the community at large or of other adjacent owners. But it has simplified exposition and discussion to leave out of account public, i.e. statutory or municipal, limitations upon 'private' ownership. To the Nazis, however, the principle of leadership makes the term 'private ownership' abhorrent; to use it is to fall back once more into 'Liberal' errors. They have given effect to this view by agrarian legislation restricting free disposition of farms, punishing bad farming, and relieving good farmers of debts incurred through no fault of their own. In the case of the so-called 'incorporeal' forms of property, such as copyright and patent rights, this standpoint means that the author or inventor may only expect what the State is pleased to allow him, and that he must be satisfied that the community should reap where he has sown.

Possession. Advancing legal systems find it neces-

sary to draw a distinction between ownership and possession and, within certain limits, to protect possession as such without inquiring whether its origin has been in accordance with law. At its highest, this separation of the notion of physical control from that of legal title can perhaps be justified on philosophical and even ethical grounds; at its lowest, it can be defended as a practical necessity. To the Nazi lawyers, however, it is just another instance of the tendency of individualistic Liberalism to see in the State nothing more than an umpire or 'night-watchman', whose function it is to remain quiescent until there is some compelling reason for active intervention.

Contracts. It has come to be recognized as a condition of ordered social life that, in principle, contracts, freely entered into, are binding on the parties until dissolved by mutual consent. On the other hand, it is undeniable that, with the best will in the world, a party may sometimes find that circumstances have made it impossible for him to carry out his undertaking. Social stability depends upon the extent to which this plea of 'frustration', as the lawyers term it, is allowed to weaken the general belief in the sanctity of contracts. In the realm of treaties, as all the world knows, Nazi Germany has put the exception in the place of the rule, and has found no difficulty in finding some sort of reason for unilateral denunciation of its agreements. Its general attitude to international law, as will be seen later, is incompatible with respect for international engagements. But, even

in the sphere of private as opposed to public contracts, the Nazi emphasis on the fluidity of legal relations has tended to make the doctrine of 'impossibility of performance' the corner-stone of the law of obligations.

The traditional theory has been that the terms, if not the binding force, of contracts depend upon the intention of the parties. Where this intention is express, there is usually little difficulty. It is chiefly where the parties have thought insufficiently, or not at all, about the matter, that the law, which in general means the judge, is called on to supply the deficiency. In doing so, the Courts have hesitated to declare openly that they have made a contract for the parties; they have preferred to speak of an 'implied' intention attributed to the parties by the law. This fashion of speech has deceived few, but the Nazi lawyers include it in their indictment of non-Nazi law. It is true that the German Code contains two sections requiring that the performance and interpretation of contracts should be such as good faith demands, but it is alleged that, owing to their 'Liberal' proclivities, the pre-Nazi judges made too little use of these provisions.

Collective agreements in industry, so far as they are allowed, are naturally interpreted as enacted rules of law rather than as agreements. But it is the contract of marriage, if it may be called a contract, which offers the Nazis most scope for expatiating upon the interest of the Nation-State in keeping watch over the 'private' lives of individuals. Here as elsewhere the intentions of the parties are

allowed only a secondary place. German marriages are, in principle, assumed to be indissoluble, and their purpose to be primarily to promote racial purity and vigour. Therefore those who are held to be incurably weak in body, mind, or character should be debarred altogether from contracting a German marriage, and the law must refuse to recognize mixed marriages involving a mixture of 'Nordic' with other blood; and not only must future marriages satisfy the test, but existing unions are to be declared void without regard for the happiness of the individuals who are wrenched apart.

Nazi totalitarianism also expresses itself in its attitude to arbitration. It is a feature of modern legal systems that, even when they do not actively encourage resort to an arbitrator, they at least put no positive obstacles in the way of those who wish to save the cost and avoid the recrimination often involved in litigation. Apart from their general aversion from conciliatory methods of settling disputes, whether between individuals or States, the Nazis look with suspicion on arbitration as removing from the watchful eye of the judges, and therefore of the Party, matters which may affect the interests of the State.

International Law

As with national, so with international law, the Nazi doctrine starts from the assumption that the validity of any legal system implies a certain community of outlook on the part of those whose conduct is to be regulated by it, and that this, of course, can only

arise through kinship of blood. Some of the German writers accept the conclusion that the only international system which could be binding on Germany would be one confined to 'Nordic' peoples. Among the many criticisms they make of the League of Nations is that it jumbles together advanced and semi-civilized, Christian and heathen, Western and Oriental peoples. Any talk of a World-Union seems to them a betrayal of national faith in the interests of 'Jewish free-masonry'. Until quite recently, reputable text-books current in Germany were declaring that Soviet Russia could not be a loyal member of the international community, because its ideal was not the Nation-State based on race but a proletarian world-State based on class. Its outlook made it not merely a stranger in the family of nations, but an enemy within the gates, and its entry into the League of Nations was seen as a transparent device to promote the world dictatorship of the proletariat.

Within this select circle of nations there is to be equality of rights; those outside it will have no rights at all. Thus the Covenant of the League of Nations is reviled as conflicting with the basic principle of equality; so far is it from making law, it is itself contrary to law. And naturally the Treaty of Versailles is repudiated as a *Diktat* rather than a freely negotiated treaty. But Nazi Germany has also flouted treaties which were not concluded under compulsion. To justify these breaches of faith, the Nazis resort once more to the doctrine of race and its corollary, the doctrine of *Lebensraum* (living-space).

Though they have no room for the natural rights of the individual, the Germans make much play with the natural rights of the State—by which they mean the German Nation-State. Hitler in *Mein Kampf* speaks of frontiers being defined by the 'eternal law' rather than by man. When, however, we look into this law, we find it simply a euphemism for 'the good old rule, the simple plan' of the robber. For if the natural right of Germany is to prevail over similar natural rights of other States, it can only be by virtue of some peculiar superiority inherent in the German race as such. And indeed German writers have not scrupled to proclaim that the German theory of the State, and therefore of international law, rests ultimately on the belief in the 'special divine mission of the German people'. But at this point it becomes clear that what the Germans respect is not race as such, nor even a racial mission, but simply a race strong in arms. Superior races, it is said, have the right to force their will upon inferior races; and their superiority is proved by the very act of overcoming opposition. The better is the stronger, the stronger is the better.

Some colour is given to this identification of right with might by the doctrine of *Lebensraum*.[1] The Covenant of the League, the Briand-Kellogg Pact, and all treaties which limit German expansion are branded as static, while the doctrine of *Lebensraum* is extolled as a dynamic principle giving due recognition to changing conditions. Article 10 of the

[1] See *Living-space and Population Problems*, by R. R. Kuczynski, Oxford Pamphlet No. 8, in this series.

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Covenant, by which the Members of the League undertook 'to respect and preserve as against external aggression the territorial integrity and existing political independence of all Members of the League', is condemned as merely crystallizing the *status quo* in the interests of the 'haves' against the 'have nots'. The members of the League, say the Germans, have never made any attempt to apply Article 19 of the Covenant, providing for the peaceful revision of treaties or conditions which have become inapplicable or dangerous to peace; therefore Germany has no alternative but to secure alteration by force. Law, to the Germans, is something essentially fluid; legal relations must always be moving—provided, of course, that they move in a direction favourable to Germany. Thus a war for racial ends, such as to bring within the Reich people of German race on foreign soil or to protect their interests, is not a breach of law but a method of executing the law. The official Nazi exponent of the racial theory joyfully proclaims that whether races live or die depends on their strength. 'Against weaker races the strong can claim the right to take the land they need for a home for themselves and their descendants.'

The Attack on Rationalism and Humanitarianism

Legal systems can never be entirely stable nor even approximately complete and definite. Nevertheless, democracies have always cherished the ideal of a reasonable degree of certainty in the rules of law. To the Nazis such a goal seems not merely

unattainable but undesirable. It smacks too much of an objective and rational attitude to human relations to make it acceptable to men who fear that their own position would be jeopardized by any relatively stable political and legal order.

This is clearly shown in their treatment of the criminal law. If the aim of the criminal law, say the Nazis, is to protect the community against any one who threatens to break the peace, which, so they assume, is the same as threatening the existence and power of the State, there is no reason for treating the criminal differently from a foreign foe. The struggle against crime must therefore be waged as ruthlessly as if it were a war. The Nazi lawyers, with their love of the dramatic, compare the State, when administering the criminal law, to a soldier facing an enemy. Even an official report describes the Nazi attitude to crime as 'heroic'. All crime is anarchy, and if anarchical elements are to be rooted out, there must be no half-measures, for attack is always the best defence. The intent is almost as dangerous as the deed, and the terror of State retribution must be present in the man's mind at the moment of temptation. And once the wrong is done, the aim must not be reform but revenge. The Nazis have no patience with the doctrine that wrong-doing is the result of environment. 'The body of the murdered man cries aloud for vengeance.'

It is impossible for any legal system to remain constantly in such a state of high tension, and the greater part of the German criminal law is in detail not very different from that of the other Western

States, but Nazi emotionalism frequently makes itself felt. Modern criminal law, more than any other branch of law, has come to be associated with statute. 'No punishment', said the Weimar Constitution, 'may be inflicted for any act, unless the act was designated by the law as punishable, before it was committed.' Closely allied to this are the other principles, that any new addition to the list of criminal offences should have express statutory sanction, and that, in interpreting a statute against an accused person, the judge should not in general go beyond the literal meaning of the words. Although occasionally departed from, these checks upon judicial and executive extension of the criminal law continue to furnish citizens of democratic countries with an effective safeguard against arbitrary power. The Nazis, however, deride such regard for statute as weak squeamishness and all three principles were explicitly abrogated by a law of June 1935. If the Court can find no statute directly in point, it is still to convict, if the accused's act seems to be covered by the general idea underlying some statute and ought to be punished 'according to sound popular sentiment'.

The modern judge is urged to take as his model the old German popular Courts whose function was to express popular or racial rather than rational or technical notions of law. Why should duelling be punished, it is asked, when refusal to accept a challenge is looked on by general opinion as cowardly and shameful? On the other hand, since popular sentiment is only 'sound' when it commends itself to

the Party and in the last resort to the *Führer*, the whole process in political crimes is based on the assumption that the accused is guilty until he proves his innocence. And even after he has obtained a verdict in his favour, he may find the Gestapo waiting on the steps of the Court itself to spirit him off to a concentration camp, where he may linger for years after he has proved himself guiltless of the crime charged against him. His personality may be such, it is said, that there can be no other guarantee for his future good conduct; or the 'protective custody' may be defended as necessary to protect him from popular hatred, for the question is not whether the public is in fact indignant but whether it ought to be. In the same way, political motives may excuse what would otherwise be criminal. 'It is not theft', says one university professor, 'for the Hitler Youth to seize the banner of the Catholic Youth Organization and to keep it as a trophy', and this is not because such an act may be little more than a childish prank but because it shows an aggressive enthusiasm which is commendable in the eyes of the Party. And that obnoxious person, the 'common informer', as we call him here, flourishes mightily in a land where every one is encouraged to spy upon his neighbour and where the Secret Police are an indispensable wheel in the machinery of government.

It is not surprising that the Nazis, who have called for a new and specifically Nazi form of art and even of humour, should have claimed that they

have introduced an original conception of law. Law, they say, is not a matter of logic, nor of reason, nor of morality, nor again of instinct; it is not a string of paragraphs, nor a theory of State and Society. It is a new way of life. Science, in law as elsewhere, is conceived by the Nazis in terms of race. Law is something living in the blood, and at the same time something lived by a people.

In their use of the terms 'Nordic' and 'Aryan' the Nazi lawyers have clearly abandoned the realm of legal science for another in which they cannot claim to speak with authority. They have become ethnologists and biologists. They have, none the less, asserted that their racial assumptions will stand the scrutiny of the natural scientists. And in this they stand self-condemned, for outside Germany the biologists have unanimously and decisively pronounced that, whatever else it may be, the racial doctrine is bad biology.[1]

[1] See *'Race' in Europe*, by Julian Huxley, Oxford Pamphlet No. 5, in this series.